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No. ____

IN THE

Supreme Court of the United States

October Term, 1983

SIGMUND DIAMOND,

Petitioner,

v.

FEDERAL BUREAU OF INVESTIGATION, WILLIAM WEBSTER, Director, Federal Bureau of Investigation, UNITED STATES DEPARTMENT OF JUSTICE, GRIFFIN BELL, Attorney General of the United States, UNITED STATES DEPARTMENT OF STATE, and CYRUS VANCE, Secretary of State,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HALIBURTON FALES, 2d
14 Wall Street
New York, New York 10005
(212) 732-1040
Counsel for Petitioner

August 12, 1983

QUESTION PRESENTED

Whether it is permissible for a district court to grant summary judgment based solely on an affidavit containing assumptions and inferences rather than the personal knowledge of the affiant, an FBI agent, where the result is to protect information from disclosure by alleging an "implied assurance of confidentiality" under the "confidential source" exemption of the Freedom of Information Act.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Sigmund Diamond petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in the proceeding on May 16, 1983.

OPINIONS BELOW

The opinion of the court of appeals, not yet reported, appears in Appendix A hereto. The notice of judgment entered by the court of appeals, sent by the Clerk of the Court, is Appendix B hereto. A relevant opinion was rendered by the United States District Court for the Southern District of New York on August 5, 1981. It is reported at 532 F. Supp. 216 and appears herein

as Appendix C. An endorsement order, entered by the district court January 26, 1982, is Appendix D.

JURISDICTION

The judgment of the court of appeals was entered on May 16, 1983, as evidenced by Appendix B. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Exemption 7 of the Freedom of Information Act (5 U.S.C. § 552(b)(7)) provides in pertinent part:

> This section does not apply to matters that are—(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source. . . .

Rule 56(e) of the Federal Rules of Civil Procedure provides in pertinent part:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein. . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth

specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

STATEMENT

The dispute in this case involves the efforts of the petitioner, Professor Sigmund Diamond, to obtain information at least 30 years old from the Federal Bureau of Information ("FBI") under the Freedom of Information Act (the "Act" or "FOIA"), 5 U.S.C. § 552 (1976). The petitioner, who is the Giddings Professor of Sociology and a Professor of History at Columbia University, sought information in connection with his scholarly historical research into the relationship between the FBI and universities during the McCarthy era.

Prior to commencing his suit Petitioner had obtained, by requests to the FBI under the Act,[1] 638 pages of documents without redaction and 382 with redaction. An additional 118 pages had been withheld in their entirety. A study of the documents released and other preliminary research have revealed the existence of a relationship of mutual cooperation between the FBI and many universities in the 1940's and 1950's with respect to the investigation of alleged Communists, which suggests the error in the widely-held notion that the universities were powerful sources of opposition to McCarthyism. Key sociological and historical questions remain as to the extent of this relationship, how it was established and how it functioned. The FBI's redactions and withholdings leave serious gaps in the historical research which seeks answers to these questions.

In July 1979, Petitioner filed an action in the United States District Court for the Southern District of New York to compel disclosure of the information redacted and withheld. Following

[1] The requests were for documents concerning (1) relations between the FBI and Harvard University, (2) the "Harvard Crimson", (3) the Russian Research Center at Harvard University and (4) a survey directed by FBI Director J. Edgar Hoover in 1953 of Communist Infiltration into Education at 55 listed universities, limited to Harvard, MIT and Johns Hopkins University.

submission of affidavits purporting to justify each withholding and deletion under exemptions of the FOIA and the Privacy Act, defendants moved for summary judgment dismissing the complaint. The district court granted summary judgment to the defendants as to withholdings and deletions under certain exemptions. The court also found those withholdings and deletions to which the FBI claimed the confidential source exemption applied, basing its claim solely on the ground that the source of the information was a "confidential source" because he or she had "implied assurances of confidentiality", insufficient to justify the use of exemption 7(D) of the FOIA. *Diamond* v. *F.B.I.*, 532 F. Supp. 216 (S.D.N.Y. 1981) (Carter, J.). In that opinion Judge Carter required the FBI to submit a supplementary affidavit setting forth the circumstances which would justify the assertion that the source had implied assurances of confidentiality. 532 F. Supp. at 231. (Appendix C at A-34.) The court stated that it could not be determined from the record

(1) "whether the interviewees even knew that their interviewer was an FBI agent";

(2) "what the interviewees were told about the subject of the Bureau's investigation";

(3) "whether they would properly have felt it to be 'highly sensitive and serious' . . . such that their confidentiality should be assured."

532 F. Supp. at 231. (Appendix C at A-34-35.)

The affidavit of FBI Agent Tom D. King ("King Affidavit") submitted in response, admitted and demonstrated an utter *lack of personal knowledge* as to any of the facts which might have answered those questions as to the justification of the exemption. Nor were any such facts provided. The King Affidavit contained no allegations as to King's qualifications or competence to testify as to the circumstances under which any source provided information to the FBI. King described himself in an earlier affidavit as an FBI Special Agent "assigned in a supervisory capacity" to the FBI's FOIA office. His personal qualifications, he stated, are a familiarity "with the procedure followed

in processing FOIPA requests" and a personal familiarity "with the procedures followed in response to certain of plaintiff's FOIPA requests," but he did not assert any personal knowledge of relevant facts.

As a result, the King Affidavit merely set forth King's personal views, based only on a review of the documents themselves, that each of the sources had provided information to the FBI in circumstances under which, in his opinion, it was reasonable to infer an assurance of confidentiality. King did not provide any facts about the sources claimed as "confidential sources" or about the circumstances in which the FBI received information from them. Indeed, he could not possibily have had any personal knowledge of such facts since the information had been obtained over 30 years earlier. He merely asserted conclusions as to what might have transpired.

On the basis of the King Affidavit, the government's motion for summary judgment was granted as to the material withheld under FOIA Exemption 7(D) on the ground of "implied assurances of confidentiality". The opinion read in pertinent part: "The court is satisfied with the government's explanation and finds reliance on the (b)(7)(D) exemption appropriate." Endorsement order of January 26, 1982. (Appendix D at A-43.) There was no further discussion of this issue. Final judgment was entered on October 29, 1982, granting defendants' motion for summary judgment and dismissing the complaint. Petitioner's request for reconsideration was denied.

On appeal, the Court of Appeals held that the FBI was not "required to present an affidavit, based on personal knowledge, demonstrating an express or implied promise of confidentiality . . . given to each source." *Diamond* v. *FBI*, No. 82-6349, slip op. (2d Cir. 1983). The court thus refused to follow the "personal knowledge" requirement applied in *Londrigan* v. *FBI*, 670 F.2d 1164 (D.C. Cir. 1981), distinguishing *Londrigan* on the ground that it dealt with the Privacy Act while this case concerned the parallel provision under the FOIA. It is of this that Petitioner complains.

REASONS FOR GRANTING CERTIORARI

It is a fundamental rule that in order for a district court to grant summary judgment based on affidavits, the affidavits must be based "on personal knowledge . . ." Rule 56(e), Fed. R. Civ. P., 28 U.S.C. By affirming the district court's grant of summary judgment in this case, the court of appeals has created a conflict in the circuits on the important issue of whether Rule 56(e) applies to affidavits submitted in support of an attempt by the government to withhold information from the public under a claim that disclosure would disclose the identity of a "confidential source" where the only link to confidentiality is the government's claim of "implied assurances of confidentiality". It is necessary for the Court to resolve the split in authority that now exists between the Second and District of Columbia Circuits[2] in order for future requests for information under the FOIA to be processed and answered without administrative and legal uncertainty and without doing damage to the fundamental purposes of the FOIA.

The grant of summary judgment on a claim that an agency has fully discharged its disclosure responsibility under the FOIA is proper "only if the moving party proves that no substantial and material facts are in dispute." *National Cable Television Ass'n* v. *FCC*, 479 F.2d 183, 186 (D.C. Cir. 1973). *Accord Weisberg* v. *Department of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980). The question of whether an "implied assurance of confidentiality" existed at the time that sources informed the FBI is a question on which the facts are in dispute. Thus, it was inappropriate for Judge Carter to grant summary judgment. At the very least, both he and Petitioner were entitled to evaluate the affidavit of someone with personal knowledge of facts in order to determine whether there was in fact an "implied assurance of confidentiality" such that a source may be considered a "confidential source" under Exemption 7(D). Under the parallel concept expressly set

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[2] In *Londrigan* v. *FBI*, 670 F.2d 1164 (D.C. Cir. 1981) the court of appeals held such an affidavit lacking personal knowledge insufficient for a grant of summary judgment. In *Diamond* v. *FBI*, No. 82-6349, slip op. (2d Cir. 1983), the court of appeals upheld summary judgment on a similar affidavit.

forth in Privacy Act Exemption (k)(5),[3] it has been held that the FBI must support its claim with affidavits of someone with personal knowledge of the interview or other circumstances in which information was furnished. *Londrigan* v. *FBI*, 670 F.2d 1164 (D.C. Cir. 1981). The same should be required here.

In *Londrigan*, the FBI had claimed exempt under Exemption (k)(5) the names of persons who had provided the FBI with information about the plaintiff in 1961 when he was under investigation for a position as a Peace Corps volunteer. The FBI's motion for summary judgment was supported only by an affidavit of a Special Agent who, like Agent King here, was then a supervisor of the FBI's Freedom of Information and Privacy Act Sections. The FBI's affidavit in *Londrigan* set forth practically word-for-word the same justification for its deletions under Exemption (k)(5) as was given here by Special Agent King for the Section 7(D) deletions based on an implied assurance of confidentiality. In each case the justification was nothing more than the affiant's unsupported assumption of what people in general may assume when they are interviewed by the FBI. Although found sufficient by the district court, the affidavit in *Londrigan* was found insufficient to justify withholding the names of sources on the basis of implied assurances of confidentiality by the court of appeals. The court stated:

> The Wroblewski affidavit does not suffice to establish that the Londrigan interviewees were all, or indeed in any particular instance, impliedly assured of confidentiality. Wroblewski reveals nothing unique, in terms of need or desire for confidentiality, about this group of persons or their comments; rather, he asks the courts to do what Congress has already re-

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[3] 5 U.S.C. § 552(k)(5) (1976). That provision protects from disclosure certain categories of investigatory material to the extent that its disclosure would reveal the identity of a source described as follows:

> a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

> fused to do—except all pre-1975 investigative files from disclosure.

670 F.2d at 1171. The court went on to state in *Londrigan*:

> Irrefutably, the most critical part of the Wroblewski affidavit does not rise to the level Rule 56(e) demands. Careful reading of this section of the affidavit reveals that a great deal of what it says could not possibly have been based on the affiant's personal knowledge of the documents in question or the details of the investigation that produced them. . . . He cannot possibly have personal knowledge of any assumptions made by persons interviewed by other FBI agents, and while he might be competent to testify to difficulties the FBI would encounter were promises of confidentiality not implied, that information is simply not pertinent to this litigation. As we noted earlier, Congress was aware of the negative aspects of releasing information in agency investigative files, but opted in favor of disclosure, subject only to narrowly defined limitations. Moreover, the Privacy Act permits data collected after the effective date of the statute to be withheld only if an express promise of confidentiality was made; thus, the situation Wroblewski alludes to no longer exists.
>
> In sum, Wroblewski's affidavit undertook precisely the type of presentation Rule 56(e) prohibits. The District Court's refusal to grant Londrigan's motion to strike the Wroblewski affidavit must be rectified. On remand, the court must disregard the impugned part of the affidavit in its entirety.

Id. at 1174-75.

Under Exemption 7(D) of the FOIA, the agency must disclose information about "sources" of information, regardless of any privacy interest, unless such disclosure would "disclose the identity of a confidential source." In order for sources to be

protected as "confidential sources," the information they provide must be furnished either "under an explicit assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred."[4]

As to the 7(D) withholdings which the FBI attempted to justify in this case on the basis of "implied assurances of confidentiality", it failed totally to describe any factual circumstances based on the Agent's personal knowledge from which it could reasonably be inferred that the particular source had any assurance of confidentiality. Where an assurance of confidentiality cannot reasonably be inferred from the particular factual circumstances, the 7(D) exemption should not apply. *See Londrigan* v. *FBI*, 670 F.2d 1164 (D.C. Cir. 1981); *Canadian Javelin, Ltd.* v. *SEC*, 501 F. Supp. 898, 903-04 (D.D.C. 1980).

Implied assurances of confidentiality have been found where the source faces physical harm if the identity is revealed. *See, e.g., Nix* v. *United States*, 572 F.2d 998, 1005 (4th Cir. 1978). On the other hand, where the circumstances are such that a source is likely to furnish information to the agency without regard to whether he or she has or perceives an assurance of confidentiality, an implied assurance of confidentiality is inappropriate. *Title Guarantee Co.* v. *NLRB*, 534 F.2d 484, 489 n.11 (2d Cir.), *cert. denied*, 429 U.S. 834 (1976). Such nice questions quite obviously are wholly inappropriate to resolve on the basis of assumptions or inferences by one with no personal knowledge of the facts.

In the instant case the court of appeals upheld the grant of summary judgment to the FBI where the King Affidavit did not provide anything more than unsupported assumptions. In no case did the King Affidavit provide any fact based on his own

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[4] Conference Report, H. Rep. No. 93-1380, 93d Cong., 2d Sess. (1974), *reprinted in* Subcomm. on Gov't Operations & Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, *Freedom of Information Act and Amendments of 1974 (P.L. 93-502): Source Book: Legislative History, Texts, and Other Documents*, at 230 (Joint Comm. Print 1975).

personal knowledge.[5] The documents involved are approximately 30 years old. King did not participate in any of the interviews or any investigation himself; and neither King nor anyone else at the FBI made any effort to contact any of the agents or other FBI employees who would have such personal knowledge. Withholding information cannot be justified and summary judgment cannot be granted in such circumstances.

The King Affidavit did not supply the answers to the district court's own questions. There is in most instances no indication (1) that the source knew the agent to be an agent or (2) that the source had any idea about the nature of the FBI's investigation or even (3) that the source provided its information to the FBI in interviews. King inferred the existence of interviews from assertions based on the Smith Affidavit. Once an interview had thus been inferred, King typically inferred from the "fact", coupled always with the "nature of the information" provided, that "the source provided the information to an FBI agent during the course of an interview which the source understood to concern a serious investigation being conducted by the FBI". Thus, the King Affidavit with respect to Exemption 7(D) rests solely upon inferences which themselves rest upon other inferences. The King Affidavit, like the affidavit in *Londrigan*, is unacceptable and should not support summary judgment for the FBI. *Londrigan* v. *FBI*, 670 F.2d 1164, 1174 (D.C. Cir. 1981).[6]

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[5] A typical example of Agent King's inferences based on inferences can be found at page six of the affidavit:

> (H) The Statements elicited from this interviewee *could* only have been obtained by an individual *who would have advised* the interviewee of the nature of the investigation. The interviewee *therefore must have appreciated* the highly sensitive nature of the investigation being conducted and the significance of the information he was furnishing. *Given these facts, and the fact that there is no evidence on the record that the interviewee waived any expectation of privacy or confidentiality, it must be inferred* that he furnished the information that he did with the understanding it would be held in confidence. (emphasis added.)

[6] A situation similar to that involved in the present case is that presented in the prison civil rights decisions. Where a defendant warden supplies an affidavit to the district court, and the affidavit explains the results of the

CONCLUSIONS

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

Haliburton Fales, 2d
14 Wall Street
New York, New York 10005
Counsel for Petitioner

August 12, 1983

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warden's investigation of the incidents in question, the courts have found it inappropriate to grant summary judgment. *Cummings* v. *Roberts*, 628 F.2d 1065 (8th Cir. 1980); *Stinnie* v. *Fidler*, 75. F.R.D. 462 (E.D. Va. 1977). The wardens' affidavits have been held to be inadequate to support summary judgment because they are not based on personal knowledge. Similarly, the affidavit of Agent King was based on a review of the files and not on his personal knowledge. Just as a warden's statement upon review has been held inadequate for summary judgment, the King Affidavit should have failed also.

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1256—August Term, 1982

(Argued May 4, 1983 Decided May 16, 1983)

Docket No. 82-6349

SIGMUND DIAMOND,

Plaintiff-Appellant,

—against—

FEDERAL BUREAU OF INVESTIGATION, WILLIAM WEBSTER, Director, Federal Bureau of Investigation, UNITED STATES DEPARTMENT OF JUSTICE, GRIFFIN BELL, Attorney General of the United States, and CYRUS VANCE, Secretary of State,

Defendants-Appellees.

Before:

KAUFMAN and VAN GRAAFEILAND, *Circuit Judges*, and MISHLER, *District Judge*.*

* Of the United States District Court for the Eastern District of New York, sitting by designation.

Appeal from a judgment of the District Court for the Southern District of New York, Robert L. Carter, *Judge*, upholding the Government's use of certain Freedom of Information Act exemptions to justify refusal to disclose materials in possession of the Federal Bureau of Investigation.

Affirmed.

HALIBURTON FALES, 2d, New York, N.Y. (Dorothea W. Regal, New York, N.Y., *of Counsel*), *for Plaintiff-Appellant*.

FRANKLIN H. STONE, Assistant United States Attorney, Southern District of New York, New York, N.Y. (John S. Martin, Jr., United States Attorney, Southern District of New York, Jane E. Bloom, Thomas D. Warren, Assistant United States Attorneys, *of Counsel*), *for Defendants-Appellees*.

KAUFMAN, *Circuit Judge*:

This is an appeal from Judge Carter's refusal to compel disclosure of certain materials pursuant to the Freedom of Information Act ("FOIA"). We are spared an extensive recitation of the facts and procedural history, since both are admirably set forth in the district court opinion, *Diamond* v. *FBI*, 532 F. Supp. 216 (S.D.N.Y. 1981). We shall refer only to those details necessary to our discussion.

The judgment is affirmed, substantially for the reasons stated in Judge Carter's careful and comprehensive opinion, *id.*, and the memorandum endorsement filed January 26, 1982, *Diamond* v. *FBI*, No. 79 C 3770 (S.D.N.Y. Jan. 26, 1982), *reprinted in* Joint App. at A 430 to A 432. Briefly, we shall consider several arguments raised for the first time on appeal, and therefore not directly considered by the district judge.

Appellant argues that two of the FOIA exemptions involved in this case, 5 U.S.C. § 552(b)(7)(C), (b)(7)(D),[1] may not be used to justify deletions from documents more than fifteen years old. In support, he points to a single, isolated remark in a report issued by House-Senate conferees considering the 1974 Amendments to FOIA. The conferees "express[ed] approval of the present Justice Department policy waiving legal exemptions for withholding historic investigatory records over 15 years old, and they encourage[d] its continuation." H.R. Rep. No. 1380, 93d Cong., 2d Sess. (1974), *reprinted in* Subcomm. on Government Information and Individual Rights of the House Comm. on Government Operations & Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary. *Freedom of Information Act and Amendments of 1974 (P.L. 93-502):*

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[1] These provide:

> (b) This section does not apply to matters that are—
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> • • •
>
> (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . .
>
> (C) constitute an unwarranted invasion of privacy [or]
> (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by a confidential source.

Source Book: Legislative History, Texts, and Other Documents 230 (Joint Comm. Print 1975).

Even were we to consider this one statement dispositive of the issue, we read it as implicitly recognizing the discretion vested in the Justice Department to depart from its policy in particular cases or to discard the policy entirely. An expression of approbation hardly amounts to a legislative directive. Moreover, the language of the statute contains no limitation of the sort Diamond would have us adopt. It would have been a simple matter for Congress to have included a provision in FOIA requiring release of all documents of a certain vintage. This case demonstrates the wisdom of the decision not to have done so. As Diamond's own scholarly articles reveal, the McCarthy era was and remains a highly controversial episode in our nation's history. For persons who were subjects of FBI investigations or who cooperated with the agency, the potential for embarrassment, harassment, or other repercussions remains acute. The dangers of disclosure may apply to old documents, and we therefore decline to adopt a per se rule requiring release in the face of those hazards. *See Lamont* v. *Department of Justice*, 475 F. Supp. 761 (S.D.N.Y. 1979) (McCarthy era documents); *cf. Ferry* v. *CIA*, 458 F. Supp. 664 (S.D.N.Y. 1978) (documents more than sixteen years old may be withheld pursuant to personnel and medical files exemption, 5 U.S.C. § 552(b)(6), even where government bears heavier burden of demonstrating "*clearly* unwarranted invasion of personal privacy") (emphasis supplied).

Diamond also challenges Judge Carter's analysis of the Government's use of exemptions 7(C) and 7(D). As to the former, he contends the district court impermissibly employed a per se "consent" test in determining whether the

7(C) "invasion of personal privacy" exemption would be upheld. Appellant might have a claim, had Judge Carter required disclosure only where the person named had manifested consent to release of his identity, but otherwise failed to engage in the balancing test mandated, *e.g.*, *Fund for Constitutional Gov't* v. *National Archives and Records Serv.*, 656 F.2d 856, 862 (D.C. Cir. 1981); *Ferri* v. *Bell*, 645 F.2d 1213, 1217 (3d Cir. 1981), *modified on other grounds*, 671 F.2d 769 (3d Cir. 1982); *Maroscia* v. *Levi*, 589 F.2d 1000, 1002 (7th Cir. 1977); *Lamont* v. *Department of Justice, supra*, 475 F. Supp. at 777; *Forrester* v. *United States Dep't of Labor*, 433 F. Supp. 987, 989 (S.D.N.Y. 1977), *aff'd mem.*, 591 F.2d 1330 (2d Cir. 1978). In fact, the district court properly struck the required balance, pitting "the privacy interest and the extent of the invasion thereof against the public interest in disclosure . . . 'tilt[ing] the balance in favor of disclosure.' " *Lamont* v. *Department of Justice*, *supra*, 475 F. Supp. at 777 (citation omitted).

The court considered Diamond's scholarly interest in the documents and the public interest in "the effect and extent of FBI intrusions into the institutions of our society." 532 F. Supp. at 224-25. Judge Carter evaluated the consequence of the passage of time on the privacy interests of those named in the documents. In this connection, the court noted that "since the material [sought] is thirty or more years old, the privacy interests of the third parties are not all of a piece." *Id.* at 226. Judge Carter therefore withheld summary judgment pending an examination of the results of an extensive search by the Government through its files for evidence that the named parties had waived their privacy interests through death or public disclosure of involvement with the FBI, or preferred to

allow release.[2] Presumably, it is this procedure which Diamond characterizes as a "per se test."

We believe, however, that appellant misconstrues the court's approach. Judge Carter simply concluded that death or voluntary disclosure so diminished any privacy interest as to amount to a waiver, *Ingle* v. *Department of Justice*, 698 F.2d 259, 269 (6th Cir. 1983), and the identities of persons in those two categories could not be withheld. With regard to the ninety-one individuals the FBI determined were in neither group, the court noted they "are or have been the subject of F.B.I. investigations involving communist affiliations, matters of internal security or loyalty, security of government employees, espionage, etc." Memorandum Endorsement, *supra*, Joint App. at A 431. Accordingly, "in light of the sensitive nature of the matters involved and the potential damage disclosure might cause[,] . . . the government is warranted in refusing to reveal the[ir] identities . . . ." *Id.*

We agree with this eminently reasonable conclusion, and commend the district judge for his wise approach to the issue, which went beyond the facile assumption that mere mention in FBI reports will, in every case, support invocation of the 7(C) exemption.

Diamond's challenge to the 7(D) exemption is similarly without merit. In *Londrigan* v. *FBI*, 670 F.2d 1164 (D.C. Cir. 1981), upon which he mistakenly relies, the court was concerned with exemption (k)(5) of the Privacy Act, 5 U.S.C. § 552a(k)(5) (information furnished in confidence, pursuant to investigation of suitability for federal employment). It concluded the government would be required to present an affidavit, based upon personal

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2 Pursuant to Judge Carter's order, the FBI was put to the task of reviewing nearly 200,000 pages of documents.

knowledge, demonstrating an express or implied promise of confidentiality was given to each source. The panel specifically recognized, however, that its analysis was unique to the purposes and scope of the Privacy Act, and would not apply to criminal law enforcement documents:

> In response to concern that agencies such as the FBI would be hampered in their law enforcement efforts by the Privacy Act's disclosure mandate, Congress specifically exempted [from section (k) (5)] information held by these entities *for law enforcement purposes*. After weighing the competing interests in information gathered on prospective federal employees, however, Congress struck an entirely different balance. In this area, Congress plainly determined that the Government's stake in nondisclosure was far less important than it is in the context of law enforcement operations,[34] and it is evident that the citizen's interest in access to personal data affecting his ability to earn a living is of a very high magnitude.
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> 34. Exemption (k)(5) of the Privacy Act must be carefully distinguished from Exemption 7 of FOIA . . . .

670 F.2d at 1170 (footnote 33 omitted) (emphasis in original).

In light of the practical difficulty—if not impossibility—of justifying each use of the confidential source exemption by way of an affidavit on personal knowledge, the district court properly applied the "functional approach," *Lamont* v. *Department of Justice*, *supra*, 475 F. Supp. at 779 & n.74 (collecting cases), denying disclosure of the names of interviewees and others where "it is apparent that the agency's 'investigatory function depends for its existence upon information supplied by

individuals who in many cases would suffer severe detriment if their identities were known,' " *id.* at 779 (citation omitted).

Finally, we reject appellant's challenge to the section 1 exemptions, 5 U.S.C. § 552(b)(1).[3] The Government demonstrated it followed proper classification procedures pursuant to Executive Order ("E.O.") 12065.[4] *Ingle* v. *Department of Justice*, *supra*, 698 F.2d at 268. The affidavit of Special Agent Busching included numerous detailed justifications for the deletions claimed pursuant to E.O. 12065 § 1-301(b) and (d), thereby establishing that each item not disclosed "logically fell into the category asserted" (either (b) or (d)). *See Lamont* v. *Department of Justice*, *supra*, 475 F. Supp. at 768 (collecting cases following rule first enunciated in *Weissman* v. *CIA*, 565 F.2d 692, 697 (D.C. Cir. 1977)). Concerning the section 1-301(c) deletions, not presumed to cause damage to national security,[5] Judge Carter conducted an *in camera* examination. *See Brown* v. *FBI*, 658 F.2d 71, 74 (2d

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3 Section 1 exempts from disclosure "matters that are . . . specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and . . . are in fact properly classified pursuant to such Executive order."

4 E.O. 12065, 43 Fed. Reg. 28949 (July 3, 1978), 3 C.F.R. 190 (1979), provides in relevant part:

> 1-301. Information may not be considered for classification unless it concerns: (a) military plans, weapons or operations; (b) foreign government information; (c) intelligence activities, sources or methods; (d) foreign relations or foreign activities of the United States . . . .
>
> 1-302. Even though information is determined to concern one or more of the criteria in Section 1-301, it may not be classified unless an original classification authority also determines that its unauthorized disclosure reasonably could be expected to cause at least identifiable damage to the national security.

5 Section 1-301(b) and (d) classified matters are "presumed to cause at least identifiable damage to the national security." E.O. 12065 § 1-303.

Cir. 1981). Having examined each document, the judge was persuaded by the assertion in the Busching affidavit, that

> [d]ue to the uniqueness of the information, a more detailed description of the withheld classified portions of [the] document[s] would identify the source and could reasonably be expected to result in identifiable damage [to national security].

We, no less than the district court, must pay substantial deference to the affidavit submitted by the agency in the "national security" context. *Weissman* v. *CIA*, *supra*, 565 F.2d at 697 n.10 (citing S. Rep. No. 1200, 93d Cong., 2d Sess. 12 (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 6267, 6290). Apparently, Diamond can offer no better rebuttal than merely asserting his cynicism that the withheld materials may damage our nation's security.[6] This, we believe, is insufficient to counter the expertise of the agency and the considered opinion of the district judge, who examined each document and the affidavit, *in camera*.

Affirmed.

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6 This is so, Diamond avers, because previously classified materials, declassified upon review during this litigation, do not in his opinion exhibit any significant connection to national defense or foreign policy. We decline to accord much weight to this view and we reject the contention. *Military Audit Project* v. *Casey*, 656 F.2d 724, 754 (D.C. Cir. 1981); *Halperin* v. *National Sec. Council*, 452 F. Supp. 47, 51 (D.D.C. 1978), *aff'd*, 612 F.2d 586 (D.C. Cir. 1980).

SECOND CIRCUIT
UNITED STATES COURTHOUSE

FOLEY SQUARE
NEW YORK 10007

A. DANIEL FUSARO
CLERK

Date: May 16, 1983

Re: Sigmund Diamond v. FBI
Docket No. 82-6349

Dear Sir:

The Court has today handed down a decision in the above entitled cause affirming the decision of the district court.

A copy of the opinion will be mailed to you tomorrow.

Additional copies of opinions may be obtained from this office in accordance with § 0.17(7) of the rules of this Court supplementing the Federal Rules of Appellate Procedure.

Judgment has been entered today and a mandate will issue in accordance with Rule 41 of the Federal Rules of Appellate Procedure.

Your attention is directed to the provision of Rule 39(c) F.R.A.P. requiring the itemized and verified bill of costs, if any, to be filed within 14 days after entry of judgment, with proof of service.

Very truly yours,
A. Daniel Fusaro Clerk

By: Patrice Sogluizzo
Assistant Clerk

Sigmund DIAMOND, Plaintiff,
v.
FEDERAL BUREAU OF INVESTIGATION, William Webster, Director, Federal Bureau of Investigation, United States Department of Justice, Griffin Bell, Attorney General of the United States, United States Department of State, and Cyrus Vance, Secretary of State, Defendants.
No. 79 Civ. 3770 (RLC).

United States District Court,
S. D. New York.
Aug. 5, 1981.

White & Case, Stephen M. Diamond, New York City, for plaintiff; Dorothea W. Regal, New York City, of counsel.

John S. Martin, Jr., U. S. Atty. for the Southern District of New York, New York City, for defendants; Jane E. Bloom, Asst. U. S. Atty., New York City, of counsel.

OPINION

ROBERT L. CARTER, District Judge.

This is an action pursuant to the Freedom of Information Act ("Act" or "FOIA"), 5 U.S.C. § 552 (1976), and the Privacy Act, 5 U.S.C. § 552a (1976), to compel disclosure of materials in possession of the Federal Bureau of Investigation ("FBI") and the United States Department of State. The plaintiff, Sigmund Diamond, a professor of Sociology and History at Columbia University, has been seeking documents relating to government surveillance of academicians, including himself, during the McCarthy era. Prior to commencing this suit Diamond had obtained, by requests under the Act, 638 pages of documents without redaction and 382 with redaction. An additional 118

pages had been withheld in their entirety. The redacted and withheld documents are the subject of this suit.

In July, 1979, more than two years after he began his administrative attempts to secure the documents, plaintiff filed this action and a concomitant motion to require detailed justification, itemization and indexing of the withholdings and deletions—a so-called *Vaughn* motion, *see Vaughn v. Rosen*, 484 F.2d 820, 826–28 (D.C.Cir.1973), *cert. denied*, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974). Diamond's motion was granted in part, and the defendants were ordered to provide individualized statements of and justifications for exemptions claimed under the FOIA and the Privacy Act. Defendants were also ordered to provide a descriptive index of withheld documents and explanations of the numbers, abbreviations, codes, handwritten notations and other markings on the released documents. *Diamond v. FBI*, 487 F.Supp. 774 (S.D.N.Y.1979) (Carter, J.).

Several months later the government produced an index of the claimed exemptions, along with affidavits from various FBI special agents and State Department officials, describing the material in question and the administrative procedures followed in evaluating the material. The index and affidavits related each of the deletions to one or more of the following exemptions: § 552(b)(1), (b)(6), (b)(7)(C), and (b)(7)(D) of the FOIA; and § 552a(k)(5) of the Privacy Act. Following this submission the government moved for summary judgment. Diamond maintains that defendants have not adequately complied with the court's order of October, 1979, and moves for limited discovery, *in camera* review of the documents withheld or redacted, a waiver of charges related to the reproduction of the documents pursuant to § 552(a)(4)(A), and for attorney's fees. *Id.*, § 552(a)(4)(E).

The claims of exemption will be considered in turn, but one preliminary matter must be disposed of first. The government argues that Griffin Bell, William Webster and Cyrus Vance should be dropped as defendants in this action. They are named as the Attorney General and the heads of their government units, the FBI, and the Department of State, respectively.

While Bell and Vance no longer occupy their respective positions and should be substituted appropriately, the government's motion charges that, even in their official capacities, they are not proper party defendants, for jurisdiction under the FOIA and the Privacy Act is limited to enjoining *agencies* from withholding records improperly withheld. *See* 5 U.S.C. § 552(a)(4)(B); 5 U.S.C. § 552a(a)(1).

The government's motion is denied. As the court stated in *Hamlin v. Kelley*, 433 F.Supp. 180, 181 (N.D.Ill.1977):

> [S]o many cases under this Statute have been sustained against heads of departments, units and agencies that their susceptibility to suit is well established.

See also Lopez Pacheco v. FBI, 470 F.Supp. 1091, 1095 n.2 (D.P.R.1979); *Nemetz v. Dept. of Treasury*, 446 F.Supp. 102, 106 (N.D.Ill.1978). Moreover, we note that in the most recent Second Circuit case involving FOIA exemptions, *Keeney v. FBI et al.*, 630 F.2d 114 (2d Cir. 1980), Clarence Kelley, Director of the FBI, and Edward Levi, Attorney General, were retained as defendants.

Exemption (b)(1)

Exemption (b)(1) protects against disclosure of matters that are

> (A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order.

5 U.S.C. § 552(b)(1) (1976). Documents are properly withheld from disclosure pursuant to this exemption if "the President has determined by Executive Order that particular documents are to be kept secret." *EPA v. Mink*, 410 U.S. 73, 82, 93 S.Ct. 827, 833, 35 L.Ed.2d 119 (1973). Citing this provision the government has withheld or made delegations in 42 documents. Special agent Busching's affidavit asserts that such documents were properly classified in accordance with Executive Order ("E.O.")

12065, 43 Fed.Reg. 28491, and meet the classification criteria set forth therein.[1] Plaintiff does not dispute that proper procedures were followed. At issue, however, is whether the withheld items meet the classification criteria.

Judicial review of the agency's classification decisions is to be taken *de novo*, and the burden is on the government to justify its action. 5 U.S.C. § 552(a)(4)(B) (1976). This exemption, like all exemptions under FOIA, should not "obscure the basic policy that disclosure, not secrecy, is the dominant policy of the Act." *Dept. of Air Force v. Rose*, 425 U.S. 352, 361, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 11 (1976). The exemption, therefore, is to be construed narrowly. *Ray v. Turner*, 587 F.2d 1187, 1200 (D.C.Cir.1978) (Wright, J. concurring). The government meets its burden if its affidavits establish with reasonable specificity the nature of the documents at issue and the justification for nondisclosure, and if the description shows that the information withheld or excised logically falls within the claimed exemption. *Ray v. Turner, supra*, 587 F.2d at 1194–95; *Weissman v. CIA*, 565 F.2d 692, 697 (D.C.Cir.1977).

In his affidavit accompanying the documents, special agent Busching explains the application of the executive order to the documents. E.O. 12065 contains procedural and substantive requirements for the classifications and requires that classified documents concern a specified category of information related to national security, including

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1. 43 Fed.Reg. 28949 (June 28, 1978). The order provides, in pertinent part:

> 1-301 Information may not be considered for classification unless it concerns:
>
> * * * * * *
>
> (b) foreign government information;
> (c) intelligence activities, sources or methods;
> (d) foreign relations or foreign activities of the United States
>
> * * * * * *
>
> 1-302 Even though information is determined to concern one or more of the criteria in Sec. 1-301, it may not be classified unless an original classification authority determines that its unauthorized disclosure reasonably could be expected to cause at least identifiable damage to the national security.

(b) government information; (c) intelligence activities, sources or methods; (d) foreign relations or foreign activities of the United States.

E.O. 12065, 1–301(b)–(d). Busching affirms that, as an intelligence declassification authority, he has examined the withheld documents. His affidavit relates the withheld materials to secret intelligence sources, secret intelligence activities or methods, secret foreign relations matters or activities, or secret intelligence information provided to the United States with the understanding that the information be kept in confidence.

In evaluating the government's refusal to disclose, the court must "accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record." S.Rep.No.93–1200, 93rd Cong. 2d Sess. 12 (1974), *U.S. Code Cong. & Admin.News* 6267, 6290 (1974); *Weissman v. CIA*, *supra* at 697 n.10. Careful consideration of defendants' affidavits and exhibits shows that the government has met its burden with respect to those items related to confidential foreign sources and other foreign relations matters, 1–301(b) and (d). The government has made limited use of these grounds, citing 1–301(b) on six occasions and 1–301(d) on five. Disclosure of this information must be presumed to cause at least identifiable damage to the national security, E.O. 12065, 1–303,[2] and the Busching Affidavit asserts that, for each of these, disclosure could reasonably be expected to cause identifiable, or, in the case of two items, serious damage to national security.[3] Busching's affidavit is sufficiently detailed to establish that each item not disclosed in accordance with 1–301(b) and (d) logically falls into the category asserted. Other courts have held affidavits no more detailed than Busching's sufficient to justify the exemptions, *e.g. Terkel v. Kelly*, 599 F.2d 214 (7th Cir. 1979), *cert. denied*, 444 U.S.

2. 1-303 provides: "Unauthorized disclosure of foreign government information or the identity of a confidential foreign source is presumed to cause at least identifiable damage to the national security."

3. The Busching Affidavit was filed on February 13, 1980. Two months later the govenment filed affidavits by agents Strong and Smith stating that, after review, certain previously classified items were deemed releasable; such items were attached to the Smith Affidavit.

1013, 100 S.Ct. 662, 62 L.Ed.2d 642 (1980); *Bell v. United States*, 563 F.2d 484 (1st Cir. 1977), and there is no reason to deviate from that norm in this case.

Plaintiff has not specifically challenged the bona fides of the government's assertions. As will be discussed, *infra*, plaintiff is generally cynical about the government's deleting documents for national security reasons, but he has raised no specific challenge to the particular documents exempted under 1–301(b) and (d). Accordingly, summary judgment is granted with respect to these eleven documents.

Plaintiff's challenge to the government's withholdings pursuant to 1–301(c) are more specific, and his grounds for skepticism more compelling. In effect, he argues that the government has sought to exempt material that could not possibly endanger national security, solely because release of that information is thought to lead to the disclosure of some intelligence source. The breadth of the government's use of 1–301(c), he contends, indicates that all the deletions should be examined *in camera* by the court.

The Act has authorized *in camera* inspection of withheld documents in the discretion of the court. 5 U.S.C. § 552(a)(4)(B). Such discretion is to be exercised with restraint, particularly where the government has made a plausible case for exemption. *Lead Industries Assn. v. Occup. S. & H. Ad.*, 610 F.2d 70, 87 (2d Cir. 1979); *Cliff v. Internal Rev. Serv.*, 496 F.Supp. 568, 572 n.9 (S.D.N.Y.1980) (Carter, J.). However, where redactions are inadequately described and insufficiently substantiated, *in camera* inspection is appropriate. *Ray v. Turner*, *supra*, 587 F.2d at 1194–95; *Lamont v. Dept. of Justice*, 475 F.Supp. 761, 770–73 (S.D.N.Y.1979) (Weinfeld, J.).

For documents withheld under 1–301(c), as for those exempted under 1–301(b) and (d), the Busching Affidavit asserts that disclosure of this information could reasonably be expected to cause identifiable damage to security. The typical justification for non-disclosure under 1–301(c) is that "the portions [excised]

contain a singular identifier for the intelligence source."[4] However, in virtually every instance, substantially more has been excluded than just the singular identifier, an expansiveness supposedly justified because

> Due to the uniqueness of the information, a more detailed description of the withheld classified portions of this document would identify the source and could reasonably be expected to result in identifiable damage as explained . . . above.

Busching Affidavit, p. 11. But this "explanation" is recited verbatim thirty-two times for exemptions claimed under 1-301(c), to justify withholding as much as four consecutive pages of material. No reason, other than the alleged uniqueness of the information, is given why each exempted document or passage, other than the singular identifier itself, would disclose intelligence sources. Moreover, why all of the substantial redactions might identify sources, other than the bald assertion that this is so, is not explained. "In sum, the government's reasons, when carefully compared with the pattern of non-disclosure, suggest

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4. A typical description for a 1-301(c) deletion is as follows:

Document Number 49, File Number 100-335070, Serial 28, is a letter dated 8/9/54 consisting of 2 pages. This document was classified Confidential on 9/20/79 by Classification Authority SP-2. The withheld classified portions, further described below, meet the classification requirements of E.O. 12065, 1-5. The withheld classified portions are confined to page 1, paragraphs 2, 3, 4, 5, 6, 7, and 8. Page 1, paragraph 2 contains a singular identifier for the intelligence source who provided the information. The remaining classified portions contain information about plaintiff's association with other individuals. Due to the uniqueness of the information, a more detailed description of the withheld classified portions of this document would identify the source and could reasonably be expected to result in identifiable damage as explained in paragraphs (4)(A)(1) and (A)(2) above.

The disclosure in the April 23 Smith Affidavit of some formerly classified items is instructive in the possible overinclusiveness of the government's approach to these documents. For example, an item that was deleted from document 188 because it contained a "singular identifier for an intelligence source" Busching Affidavit at 17, was later revealed to contain nothing more than the size and price of a Harvard University Press book that was being scrutinized by the FBI. See Smith Affidavit, p.1.

that [defendants] may have withheld segregable non-exempt material," *Lamont v. Dept. of Justice, supra*, 475 F.Supp. 761, 771, when these documents were classified under E.O. 12065, and certain of them must be examined *in camera*.

Most of plaintiff's challenge to the government's use of the (b)(1) exemption is based on his cynicism that these materials, many of which are more than thirty years old, could be presumed to involve national security. For example, he questions withholding the "travel plans of an intelligence source" (Document # 32) or documents concerning "the organization of the Communist Party of New England" (# 139) on the grounds that disclosing such items would not likely endanger national security. Plaintiff's argument on this score is misplaced. First, the court need not "test the expertise of the agency," *Weissman v. Central Intelligence Agency, supra* at 697, in evaluating the exemption, for the court will not attempt to "substitute its judgment for the agency's as to the harm which disclosure would cause," *Ferry v. Central Intelligence Agency*, 458 F.Supp. 664, 667 (S.D.N.Y.1978) (Bonsal, J.). Second, it is inaccurate to construe the government as contending that the documents themselves would jeopardize national security if released. Rather, the government avers that their release would reveal the identity of an intelligence source, and exposing the source "reasonably could be expected to cause at least identifiable damage to national security." E.O. 12065, 1–302; Busching Affidavit ¶¶ 4(A)(1) and (2).

The government asserts that each document was examined on an individual basis, and each classified by a top secret classification authority (¶ 5). Busching further affirms that he received, as a declassification authority, all withheld classified paragraphs (¶ 7). Documents over twenty years old were reviewed by the Departmental Review Committee (¶ 11). Thus, contrary to plaintiff's suggestion, the court is persuaded, as was Judge Weinfeld in *Lamont v. Dept. of Justice, supra*, that

> the interests identified in the FBI's affidavits are such that their disclosure might cause "identifiable damage to the national security": the Government's ability to

> gather intelligence information essential to national defense and security could be undermined if its secret sources and investigatory methods . . . were disclosed to the public.

475 F.Supp. at 770.

Accordingly, defendants are ordered to produce for *in camera* inspection those items listed in the margin.[5] Summary judgment is granted with rspect to the remaining items exempted pursuant to subsection (b)(1).[6]

Exemption (b)(6)

This exemption shields "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) (1976). One two-page document is at issue: a letter from a private citizen to the Department of State concerning academic contacts between that citizen and a Soviet professor, and an office memorandum from a State Department official regarding his conversation with the citizen about those contacts. *See* Affidavit of William Blair, p.2. The Blair Affidavit indicates that the citizen brought these contacts to the government's attention and that the citizen has specifically requested that his name not be disclosed in the instant action. *Id.* at 3. Only the citizen's name and address were excised from the document produced for Diamond.

The government contends that this document constitutes a "similar file" within the (b)(6) exemption and that disclosure would result in a clearly unwarranted invasion of privacy. The term "similar file" is to be interpreted broadly, *Dept. of Air Force v. Rose*, 425 U.S. 352, 372, 96 S.Ct. 1592, 1604, 48 L.Ed.2d 11 (1976), and the "common denominator in 'personnel

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5. Specifically, *in camera* inspection is ordered of the items withheld pursuant to 1-301(c) in documents 44, 48, 49, 52, 129, 132, 179, 180, 183, 188, 190, 194, 196, 199, 200, 202, 212, 213, 214, 215, 216, 222, 238, 239, 241, 245, 248, 252, 259, 267, 234, and 236.

6. Summary judgment is granted as to the 1-301(b) and (d) deletions found in Documents 13, 145, 184, 193, 210, 211, 222, 229, 240, and 253.

and medical and similar files' is the personal quality of information in the files." *Wine Hobby USA, Inc. v. United States Internal Revenue Service*, 502 F.2d 133, 135 (3rd Cir. 1974). A variety of government files have been held to constitute "similar files." *See e.g. Lamont v. Dept. of Justice, supra*, 475 F.Supp. at 781 (FBI internal security records identifying private citizens); *Pacific Molasses Co. v. NLRB*, 577 F.2d 1172 (5th Cir. 1978) (union authorization cards); *Rural Housing Alliance v. United States Dept. of Agriculture*, 498 F.2d 73 (D.C.Cir.1974). Nor has plaintiff challenged this characterization.

Plaintiff takes issue, in general terms, with the outcome of defendants' balancing the individual's privacy right against the public interest in disclosure, *Dept. of Air Force v. Rose, supra*, 425 U.S. at 372, 96 S.Ct. at 1604; *Ferry v. Central Intelligence Agency*, 458 F.Supp. 664, 666 (S.D.N.Y. 1977) (Bonsal, J.), asserting that, on balance, Diamond's scholarly need for the information compels disclosure. In this instance, the government has been careful in its use of the exemption, deleting only the address and name from the document. Further, the Blair Affidavit is thorough and forthcoming about the document's history and the informant's desire to remain unidentified. Plaintiff, on the other hand, has not even attempted to show why the particular name of this private citizen is necessary to his scholarly work, *Ferry v. Central Intelligence Agency, supra* 666-67. The government's use of this exemption is proper, *see also Lamont, supra*, 475 F.Supp. at 782; *St. Louis Post-Dispatch v. FBI*, 477 F.Supp. 31, 38 (D.C.1977), and the motion for summary judgment is granted on this exemption.

Exemption b(7)(C)

The largest number of exemptions is claimed under exemption subsection (7)(C), which allows non-disclosure of

> investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . (C) constitute an unwarranted invasion of personal privacy.

5 U.S.C. § 552(b)(7) (1976). Pursuant to this exemption, the government has withheld from the released documents infor-

mation about third parties appearing therein: names of FBI agents, clerical personnel, non-federal law enforcement officers, and government employees. Also deleted under this exemption were the names and personal information about third parties who were interviewed. Determining the propriety of non-disclosure under (b)(7)(C) involves balancing "the privacy interest and the extent of the invasion thereof against the public interest in disclosure . . . 'tilt[ing] the balance in favor of disclosure.' " *Lamont v. Dept. of Justice*, *supra* 475 F.Supp. at 777, *quoting Getman v. NLRB*, 450 F.2d 670, 674 (D.C.Cir.1971). Moreover, since the "unwarranted invasion" standard for the (b)(7)(C) exemptions is less demanding than the "clearly unwarranted invasion" standard under (b)(6), it has been suggested that "greater weight should be given to the claim of privacy when Exemption 7(C) is invoked." *Deering Milliken v. Irving*, 548 F.2d 1131, 1136 n.7 (4th Cir. 1977).

Plaintiff challenges the use of this exemption on two general grounds. First, he contends, the public interest in the effect and extent of FBI intrusions into the institutions of our society is great. *See also Ferguson v. Kelley*, 448 F.Supp. 919, 922 (N.D.Ill.1977); *Katz v. Dept. of Justice*, 498 F.Supp. 177, 181 (S.D.N.Y.1977) (Lowe, J.). These intrusions are plaintiff's scholarly focus. Second, he argues, the privacy interests of the government personnel and the informants are diminished with the passage of time. *Cf. Lesar v. U.S. Dept. of Justice*, 636 F.2d 472, 487-88 (D.C.Cir. 1980), 636 F.2d at 487-88 (public disclosure of identities would constitute unwarranted invasion in light of contemporary and controversial nature of information).

The court recognizes the public interest involved in the subject of plaintiff's research, for the McCarthy era was a lamentable period in this country's history, and its presupposition that political dissent is dangerous, an unacceptable political artifact of those times. Thus, the scope of FBI surveillance of academia is a matter of genuine public concern. Nonetheless, the privacy interest of the government personnel mentioned in the documents is also manifest. "[P]ublic identification of any of these individuals could conceivably subject them to harassment and annoyance in the conduct of their official duties and in their

private lives." *Lamont, supra* at 777, *quoting Nix v. United States*, 572 F.2d 998, 1006 (4th Cir. 1978). Courts have standardly applied exemption 7(C) to authorize non-disclosure of the identities of such personnel. *See e.g. Lesar, supra; Terkel v. Kelly, supra; Nix, supra; Lamont, supra*. Other than his general contention that privacy interests have diminished with time, plaintiff has advanced no reason why the identities of the government personnel are in any way important to his research, and it is implausible that the identities, for example, of clerical personnel could be significant. Accordingly, the deletion of names and addresses of FBI agents, clerical personnel, non-federal law enforcement officers and government employees will be sustained.[7]

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7. Specifically, summary judgment is granted as to the deletions made pursuant to § 552(b)(7)(C) at the following locations:

Doc. #	Page(s) (¶, line)
10	1
	4
	12 (¶ 3, line 4; ¶ 4, line 1; ¶ 5, line 1)
11	1
12	1
13	1, 5
14	1 (upper right hand corner; ¶ 2, line 1)
15	1
16	1
20	1
21	1, 4, 5, 7
22	5
23	2
24	1, 3
25	1
28	1, 2
31	1, Amended 14, 15
	Original 14 (¶ 1, lines 1, 2, 4, 5; ¶ 2, line 1; ¶ 4, lines 1, 2; ¶ 5, lines 1-4)
	Original 15 (¶ 13)
	Original 16 (¶¶ 9, 15)
32	1
34	1
35	1 (upper right hand corner)
	2 (¶ 7)
	3
36	1
37	1

A somewhat greater public interest may be seen with regard to the redaction of names and identifying information about third persons. Public knowledge about the scope of FBI academic surveillance will arguably be enhanced by disclosing who was being investigated. Similarly, the scope of institutional cooperation with the government's investigations are of legitimate

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38	1 (upper right hand corner)
	4
	5 (¶¶ 1, 2, 3, 4, 5, 6, 7)
	6
40	1
41	1, 3
42	1
45	2
47	1
48	1
62	1
78	1
83	2 (¶ 1, line 2)
	3 (¶ 6, line 1)
	4 (¶ 1, line 1)
84	1 (¶ 1, line 5; ¶ 2, line 2; ¶ 3, lines 10, 11)
	2 (¶ 5, line 1)
91	1
121	1
140	1 (upper right hand corner)
178	1
181	1
222	5 (¶ 2, lines 3, 5, 7)
	7 (¶ 1, lines 8, 11, 13, 15, 17)
223	2 (¶ 8)
	3 (¶ 1, ¶ 2, ¶ 3, ¶ 4; ¶ 8, line 1; ¶ 10, line 1)
	4 (¶¶ 1, 2, 3, 4, 5, 6)
229	1, 23
234	1 (upper right hand corner)
238	1 (¶ 2, line 1)
242	3 (¶ 4, line 3)
	4 (¶ 2, line 4; ¶ 3, lines 1, 2)
245	1 (upper right hand corner)
259	2 (¶ 2, line 1)
	3 (¶ 7, line 2)
	4 (¶ 5, lines 2, 3)
	6 (¶ 3, lines 2, 3)
	7 (¶ 4, line 1)
262	1 (¶ 1, lines 5, 7, 9)
296	1, 4

historical interest, and the names and professional status of those who cooperated with the FBI would arguably further our understanding of the period. *Cf. Flower v. FBI*, 448 F.Supp. 567 (N.D.Tex.1978); *Katz v. Dept. of Justice*, *supra*.

The counterbalancing privacy interest is also obvious, and weighty:

> [D]isclosure would likely cause embarrassment to the third party, either because sensitive, derogatory, or intimate personal information about him or her is contained in the file, or because the person's cooperation with the FBI investigation would itself prove embarrassing.

Lamont, *supra* at 777. Courts have frequently upheld the exemption of third parties' identities to protect their privacy, *e.g. Librach v. FBI*, 587 F.2d 372 (8th Cir. 1978), *cert. denied*, 440 U.S. 910, 99 S.Ct. 1222, 59 L.Ed.2d 459 (1979); *Maroscia v. Levi*, 569 F.2d 1000 (7th Cir. 1977). Moreover, courts have also concluded that interviewee's names should be withheld to insure that individuals may talk freely with FBI officials without fear of subsequent disclosures and possible reprisals. *See e.g. Scherer v. Kelley*, 584, F.2d 170, 176 (7th Cir. 1978), *cert. denied*, 440 U.S. 964, 99 S.Ct. 1511, 59 L.Ed.2d 778 (1979); *Forrester v. United States Dept. of Labor*, 433 F.Supp. 987, 989 (S.D.N.Y.1977) (MacMahon, C.J.), *affirmed*, 591 F.2d 1330 (2d Cir. 1978); *Frankel v. SEC*, 460 F.2d 813 (2d Cir.), *cert. denied*, 409 U.S. 889, 93 S.Ct. 125, 34 L.Ed.2d 146 (1972).

There are two respects, however, in which the government's use of exemption 7(C) is troublesome. First, in several instances the government has excised material that appears far to exceed the amount necessary to protect the identity of any third parties involved. The sheer amount, sometimes as much as several consecutive pages, and the context of such deletions suggests that a considerable quantity of non-exemptable material may have been withheld along with properly exempt items. The affidavit of special agent Donald Smith, which describes the FBI's responses to plaintiff's FOIA requests does not discuss each of the (b)(7)(C) exemptions. Rather, the Smith Affidavit comments on the exemptions in general terms, and describes,

categorically, the sorts of harms that might result from release of the withheld portions. The documents themselves, attached as exhibits to the Smith Affidavit, are each preceded by forms specifying the redactions. However, in some cases, several pages have been deleted relative to the 7(C) exemption, and neither the Smith Affidavit nor the forms provide any details regarding why so much material was withheld. In perhaps the most striking example of this, document 87, only two out of a total of twenty-nine pages were released, but the only explanation is that the remaining twenty-seven pages were "withheld in their entirety pursuant to exemption (b)(7)(C) to protect the names, file numbers and information pertaining to the activities of [various] individuals who were the subjects of investigations by the FBI." Here, as for the (b)(1) exemptions already discussed, the court finds it necessary to order an *in camera* inspection of a limited number of items, to see if non-exempt material may be segregated and released.[8] *See Lamont, supra*, 475 F.Supp. at 778.

Second, since the material that plaintiff seeks is thirty or more years old, the privacy interests of the third parties are not all of a piece. It may well be, as plaintiff suggests, that some of the

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8. Those documents, and the relevant pages, to be examined *in camera* are:

Doc.#	Page(s) (¶, line)
56	2
83	2-4 (except as indicated in note 7)
87	1-5; 10-28
89	1-8
92	7-23
96	3-7
106	1
107	1
130	1 (¶ 14, lines 2-14)
133	1 (¶ 2)
153	3 (¶ 4); 4
199	2
200	2-3
215	2
236	5, 12 (¶ 15), 14 (¶ 1), 16 (¶ 1), 17 (¶ 1), 18 (¶¶ 2 & 3)
237	2
242	2-3 (except as indicated in note 7)
245	1-4, 6, 9, 10 (except as indicated in note 7)
259	2, 3, 4, 6, 7 (except as indicated in note 7)
283	1

individuals connected with the investigations are now dead, in which case their privacy interests are diminished, *Cordell v. Detective Publications, Inc.*, 419 F.2d 989, 990 (6th Cir. 1969), *Prosser on Torts*, § 112 at 832 (3rd ed. 1964), and the balance tips towards disclosure. Further, it may be, as Diamond argues, that some of the third parties involved would prefer to allow release of the information regarding their involvement, but defendants have not checked with them to determine their preferences.

These difficulties are epistemological in nature, and not necessarily legal. To disclose the identities of third parties without determining their status or their preferences would jeopardize their privacy as well as future cooperation with FBI investigations. Plaintiff has volunteered to provide information regarding any third party's status, but he can hardly state if an unidentified party is living; yet to provide plaintiff with a list of names does much to reveal the third parties' identities. Despite the remarks, cited by plaintiff, of an official of the Department of Justice that it is standard pre-trial procedure to check with third parties to ascertain their preferences on disclosure, it is unduly burdensome to expect defendants to track down all its sources and interview them about releasing their names and involvement. To this effect, defendants rely on the statement of the Supreme Court in *Kissinger v. Reporter's Comm. for Freedom of the Press*, 445 U.S. 136, 152, 100 S.Ct. 960, 969, 63 L.Ed.2d 267 (1980): "The Act does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created and retained."

However, the instant issue does not turn on the government's creating documents and files. Nor does it necessarily require defendants to perform any substantial investigative tasks. The Smith Affidavit explains that the FBI's files, in both the Central Records System and the branch offices, is organized in a series of files referenced and cross-referenced to individuals and organizations, as well as subject matters. (*See* Smith Affidavit at 32-40). In responding to plaintiff's FOIA requests, the files for plaintiff and a number of relevant institutions were searched for responsive documents. (*Id.* at 34-40). Defendant's responsive

papers indicate that when a particular file was being evaluated for release, if the file itself "evidences that [a third party] is deceased then the file is processed accordingly." (Defendant's Reply Memorandum, p. 8n). No reason has been adduced, however, why the government could not search its existing files on the third parties to determine if they were still living, or if they have expressed a desire that their involvement be disclosed. In short, if defendants already have knowledge about the third parties, there is no apparent reason why the government's response should not reflect that knowledge.

Due to the extraordinary age of the documents at issue, and the likelihood that their age has affected the privacy interests at stake, it is appropriate to require defendants to ascertain in this case if the interviewees' privacy is still at issue. Accordingly, the government is instructed to search the existing files pertaining to the interviewees to determine if any persons whose privacy is at issue are now dead, and if they are still opposed to releasing their names and the fact of their cooperation with the FBI's investigations. A supplementary affidavit is to be submitted, detailing defendants' search of the Bureau's files. This affidavit should state, with respect to each of the interviewees, first, whether the existing files demonstrate if the interviewee is no longer living, and second, if that interviewee has indicated in any manner preferences about disclosing his name and involvement. With respect to the second question, we note that the evidence of the source's preferences should not be restricted to explicit assent from the source to the government that his involvement be disclosed. Public statements, for example, by the source about his participation in the FBI's investigations are also good indication that he no longer desires to keep his name and involvement confidential. The supplementary affidavit should indicate expressions by the source along these lines. Summary judgment regarding these deletions, therefore, will be withheld pending submission of this supplementary affidavit.[9]

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9. This information should be provided regarding each of the individuals whose names were deleted, or whose identities or involvement in an FBI investigation was protected by redactions pursuant to exemption (b)(7)(C) other than those listed in footnote 7.

Plaintiff has moved to compel "discovery in compliance with *Vaughn v. Rosen*, [*supra*] . . . and this Court's prior order." Presumably, he refers therein to forty questions to which he had sought answers in his previous motion. Those questions went to the application of the FOIA exemptions to the various redactions and withholdings, and were intended to create a record sufficient for litigation and resolution of disputes over the documents. In the previous decision of October 24, 1979, plaintiff's motion to compel answers to those questions was denied, to provide defendants the opportunity to submit the requested indexes and affidavits explaining the exemptions' application to the documents in issue. As is indicated by the court's disposition of defendants' summary judgment motion, the court has found that the government's submission satisfies for the most part the requirements posed by *Vaughan*. To the extent that the government has not fully satisfied those requirements, it appears that the appropriate procedure is to await defendants' supplementary submissions. Plaintiffs' motion for discovery is accordingly denied without prejudice to its subsequent renewal.

Finally, plaintiff has challenged the pattern of defendants' deletions, charging that the government is inconsistent in releasing or excluding the names and identities of agents and informers under the 7(C) exemption. The significance in plaintiff's eyes of this alleged inconsistency is not entirely clear. It may be that he seeks to question the government's good faith in employing the exemptions, and thus to suggest that none of the redactions may properly be regarded as justified. Then, summary judgment should be denied. Or, he may be arguing that the inconsistencies warrant skepticism regarding the government's redactions, such that *in camera* inspection of each of the documents is necessary before summary judgment or disclosure could properly be ordered.

This argument is unpersuasive, whichever form it takes. In the first place, the government's submissions establish that plaintiff's perceptions of inconsistencies are unfounded. In one case, Document 57, deletions were made in the document which had not been made when it was first made available to plaintiff. This is acknowledged by the government to be an oversight. In other instances, the government has shown that

no inconsistency was established. For example, plaintiff charges that in Documents 10 and 62, the names of special agents were deleted, but in Documents 14, 57, 58 and 61 agents' names were released. But, the government explains that in the latter set of documents, the agents whose names were released were special agents in charge and assistant directors—FBI officials—and that it was thought that the invasion of privacy and potential harm to these officials was less than in the case of the investigating agents. Therefore, the balance of public interest in disclosure versus privacy and potential harm tipped in favor of disclosure of the officials' names, but not of the investigating agents'. Plaintiff charges that in Document 35, the names of Harvard employees are redacted, but that in Document 91, the name of one such employee, Henry Kissinger, is identified. However, Kissinger is a public figure, and the balance should tip towards disclosure of information, given Kissinger's public prominence. Thus, the thrust of Diamond's concern about the putative inconsistencies is blunted by relevant differences in the situations presented by the different documents.

Second, plaintiff is overstating the potential significance of agency inconsistency, if such was to be found. "The FOIA is 'neutral', in the sense that it does not prohibit the disclosure of exempt information." *Lopez Pacheco v. F.B.I., supra*, 470 F.Supp. at 1107 (D.P.R.1979). *See also Mead Data Central v. U.S. Dept. of Air Force*, 566 F.2d 242, 258-259 (D.C.Cir.1977) and cases cited at *id.*, 258 n.45. Thus, even if plaintiff had established inconsistencies in defendants' handling of some of the exemptions, it does not follow that other of the exemptions are necessarily not justified. Except in those cases already noted, where *in camera* inspection will be required to determine if segregable, non-exempt material has been withheld, the government's submissions have established that the material withheld or excised falls logically in the category specified by the exemption and that its redaction is justified.

Exemption on (b)(7)(CD)

This clause authorizes an agency to withhold law enforcement investigatory records if production thereof would

> (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law

> enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security investigation, confidential information furnished only by the source,

5 U.S.C. § 552(b)(7)(D) (1976). Pursuant to this exemption, the government has deleted the names of persons who, defendants assert, gave information under express or implied assurances of confidentiality, as well as information they furnished that might tend to identify them. Also withheld were the identities and symbol numbers of confidential sources reporting information to the FBI on a regular basis, identities of commercial institutions and their employees. *See* Smith Affidavit at 46-53.

Under the 7(D) exemption, broad protection has been accorded to the identities of those providing information to the FBI. The informants who provided information on a regular basis did so under express assurances of confidentiality, Smith Affidavit at 48, and their identities and the information provided are clearly exempt. *Nix v. United States*, 572 F.2d 998, 1003 (4th Cir. 1978). Courts have also protected the identities of persons interviewed by the FBI, and the information thus gleaned when the interviews occurred in circumstances where confidentiality was expressly assured or where assurances of confidentiality could be reasonably inferred. *Nix v. United States, supra* at 1004-05; *Lamont, supra*, 475 F.Supp. at 779; in a case where, as here, a great deal of the material at issue is old, the interviews are by now dated, and the defendants may well have lost contact with the interviewees, defendants could not be required to demonstrate that each of the interviewees was given an express assurance of confidentiality. As Judge Weinfeld explained in *Lamont v. Dept. of Justice:*

> For an investigation that ranged over a period of thirty years, it is questionable as a practical matter, how the Department could ever make such a showing. For this reason, courts have taken a "functional" approach to such claims and have denied disclosure of the names of such interviewees and other sources where it is apparent that the agency's investigatory function de-

> pends for its existence upon information supplied by individuals who in many cases would suffer severe detriment if their identities were known.

475 F.Supp. at 779. *See also Pope v. United States*, 599 F.2d 1383, 1386-87 (5th Cir. 1979); *Evans v. Dept. of Transportation*, 446 F.2d 821, 824 (5th Cir. 1971), *cert. denied*, 405 U.S. 918, 92 S.Ct. 944, 30 L.Ed.2d 788 (1972).

Plaintiff argues, in effect, that exemption 7(D) is properly used only when releasing the confidential sources' identity poses a danger to the source itself. Accordingly, he implies, little or no danger can obtain at this time to sources who contributed information thirty or more years ago. However, the exemption itself does not limit so narrowly the harm to be avoided, and, while many of the cases applying 7(D) have focused on the peril to the sources, *e.g.*, *Nix*, *supra*; *Shaver v. Bell*, 433 F.Supp. 438 (N.D.Ga.1977), courts have protected confidential sources against less dramatic detriments as well. This exemption's use merely to protect the particular source from embarrassment has been upheld. *Lamont*, *supra* at 779, *Maroscia v. Levi*, 569 F.2d 1000, 1002 (7th Cir. 1977).[10]

Even more important has been the use of (b)(7)(D) to preserve the government's ability generally to secure the assistance of confidential sources. The Smith Affidavit explains that cooperation of sources in interviews is the FBI's most important investigative tool, at 47-48, and that fear of exposure impedes that cooperation. *Id.* at 47. Thus, the Bureau's investigative efforts would be hampered if sources were identified, and the public could no longer rely on assurances and assumptions of confidentiality. Courts have recognized that identifying confidential sources will generally impede access to other possible informa-

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10. As Judge Weinfeld explained, there is a substantial overlap between the 7(C) and 7(D) exemption as regards the identities of the interviewees:

> Not only should the names of interviewees be withheld under Exemption 7(D) on the grounds that they could reasonably have assumed that their identities would not later be revealed, but the Court further holds that since disclosure of their cooperation might now be embarrassing to them, their identities are also protected by Exemption 7(C).

Lamont, *supra* at 779.

tional prospects. *See also Frankel v. SEC*, *supra*, 460 F.2d at 817-818.

While it is clear that the identities of the sources of confidential information should be protected, it does not follow that defendants have demonstrated that the interviewees' names should in every case be withheld. For the interviewees for whom implicit confidentiality is asserted, the Smith Affidavit provides no particulars about the interviews or the circumstances under which they were conducted which would allow the court to assess whether assurances of confidentiality could reasonably be inferred. Rather, Smith states quite generally that "Persons interviewed often assume, quite logically, that the information they furnish is for the assistance of the FBI only in the fulfillment of its responsibilities, and their identities and the act of their cooperation with the FBI will not be publicly exposed." Smith Affidavit at 46. Nor are the explanations and descriptions of the deleted material which precede the individual documents more forthcoming. As a result, nothing in the record before this court indicates why assurances of confidentiality could reasonably be inferred other than the assertion by Smith that such is the case.

Accordingly, summary judgment is granted as to the deletions of the identities of informants and interviewees who provided information under express assurances of confidentiality.[11] How-

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11. Those deletions are:

Doc. #	Page(s) (¶, line)
10	2 all
	3 (¶ 1, lines 2, 6, 42, 44, 46)
	6 (¶ 1, lines 3-6; ¶ 5, lines 1, 2, 3, 7)
	7 (¶ 8, line 5)
	8 all
	9 (¶ 1, line 6; ¶ 6, lines 5-6)
	12 (¶ 2, lines 1–3)
12	all
13	all
14	all
15	all
16	all

ever, the situation is different for the names of the interviewees for whom, it is claimed, confidentiality was implicitly assured.

21	2 all; 3 all; 4 all 5 (¶ 2, line 1; ¶ 3, line 1; ¶ 4, lines 1-4; ¶ 5, line 1; ¶ 6, line 1) 6 (¶ 1, line 1; ¶ 2, line 1; ¶ 3, line 1; ¶ 4, line 1; ¶ 5, line 1; ¶ 6, line 1)
24	all
29	all
31	all
38	all
44	all
49	all
56	2 (¶ 1, lines 4-6)
73	all
83	2 (¶ 2, lines 4, 5, 6; ¶ 6, lines 3, 4, 5, 7) 3 all
130	1 (¶ 1, lines 1-3; ¶ 2, line 1; ¶ 3, line 1) 2 (¶ 1, line 1)
131	1 (¶ 2, lines 3, 5, 6; ¶ 6, line 1; ¶ 7, line 1)
132	1 (subject lines 1-4) 2 all
133	all
134	all
135	all
136	all
139	all
140	all
196	all
200	all
211	all
214	all
221	all
229	all
236	all
242	all
245	all
248	all
252	all
259	all
277	all
280	1 (¶ 1, line 1)
281	all
282	all
287	all
288	all
289	all
290	all
295	all
297	all

Since the burden is on the government to justify the non-disclosure, *Ray v. Turner, supra; Weissman v. CIA, supra,* I cannot accept an unsupported statement that each interview was conducted under an implied assurance of confidentiality.[12] Nor have defendants justified their assertion of the 7(D) exemption by affirming, in blanket fashion, that its interviews were all conducted under circumstances in which assurances of confidentiality could reasonably be inferred.[13] Even if interviewees often assume that their identities will be protected when they volunteer information to the FBI, it cannot be determined from the

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12. A contrary result was reached in *Lopez Pacheco v. Federal Bureau of Investigation*, 470 F.Supp. 1091 (D.P.R.1979) where the court upheld defendants' redactions pursuant to exemption 7(D) on similar allegations that confidentiality had been impliedly assured. However, a comparison of the government's affidavit in support of the exercise of the exemption in *Pacheco*, see 470 F.Supp. at 1102-3, with the Smith Affidavit at hand reveals some part of my concern in the instant litigation. The Smith Affidavit reiterates the affidavit submitted by special agent Loome in *Pacheco* not just line for line but virtually word for word. Thus, the Smith Affidavit engenders concern that the government has not reviewed these documents and the interviewees' circumstances individually, but rather has relied on boilerplate assertions which amount to no more than the claim that any interview conducted by its agents conveyed implicit assurances of confidentiality. *Cf. Nemetz v. Dept. of Treasury*, 446 F.Supp. 102 (N.D.Ill.1978) (denying Privacy Act exemption (k)(5) where defendants' had asserted only general policy of assuring confidentiality).

13. Judgment is withheld with respect to the following redactions, pending the government's submission of its supplementary affidavit:

Doc. #	Page(s) (¶, line)
10	3 (¶ 1, lines 22-25)
	9 (¶ 6, lines 5-6)
	13 (¶ 1, lines 1, 2)
11	all
56	1 (¶ 1, lines 1, 3, 4, 5, 6; ¶ 2, lines 1, 3, 4, 5, 6)
	2 (¶ 3, lines 6, 7; ¶ 4, line 2)
84	all
106	all
107	all
108	all
110	all
153	all
197	all
222	all
224	all
246	all

record before the court whether the interviewees even knew that their interviewer was an FBI agent. Nor can it be concluded from the government's submissions what the interviewees were told about the subject of the Bureau's investigation, and whether they would properly have felt it to be "highly sensitive and serious," *Lamont, supra*, 475 F.Supp. at 779, such that their confidentiality should be assured. In short, the government has not demonstrated its entitlement to summary judgment with respect to its redaction of the identities of allegedly confidential sources. *Deering Milliken, Inc. v. Irving, supra*, 548 F.2d at 1136-37.

As Judge Weinfeld explained in *Lamont, supra*, it would be impracticable to expect the defendants to produce affidavits or testimony from the agents who received the information to evidence the circumstances of the alleged confidentiality. It is appropriate, however, to require the government to submit a supplemental affidavit describing in further detail the context in which the information was received and whether the nature of the Bureau's investigation was revealed the the interviewee, to the extent that such information can be found in the Bureau's files and records.

With respect to the government's sources other than its interviewees, however, the government's claim of exemption may be upheld. While it is apparently a matter for debate in other jurisdictions, *see, e.gg., Ferguson v. Kelley, supra*, 448 F.Supp. at 925, *on motion for reconsideration*, 455 F.Supp. 324, it is clear that in this circuit local law enforcement agencies may constitute "confidential sources" for the purposes of (b)(7)(D). *Keeney v. FBI, supra*, 630 F.2d at 119. Although the holding in *Keeney* was explicitly restricted to local law enforcement agencies, other courts have extended the exemption to cover other law enforcement agencies generally, *e.g. Church of Scientology v. U. S. Dept. of Justice*, 612 F.2d 417 (9th Cir. 1979); *Terkel v. Kelly, supra*, 559 F.2d at 126, and commercial institutions, *Terkel v. Kelly, supra; Nix. v. United States, supra*, 572 F.2d at 1005. These decisions accord with the reasoning of the *Keeney* decision and will be followed here. Accordingly, summary judgment will be granted for the exemption of the names and symbol

numbers of law enforcement agencies and commercial institutions.[14]

The protection provided to information supplied by confidential sources is also troublesome. It is clear that exemption 7(D) protects such information which, if disclosed, might reasonably lead to disclosure of the informant's identity. *See e.g. Scherer v. Kelley, supra; Maroscia v. Levi, supra,* 569 F.2d 1000. The Smith Affidavit asserts that "wherever the information would not identity the sources, it has been left in the document," at 47, but the court is less sanguine after reviewing the documents. As was the case for the 7(C) exemption, defendants have withheld, on occasion, substantially more material that would seem necessary to protect the source's identity. On some occasions, as much as a full page has been redacted pursuant to this exemption. Nor is Smith sufficiently specific in explaining these excisions to indicate adequately why such extensive deletion is necessary. For example, three paragraphs of page one of Document 129, and all of page two, were withheld to protect a regular source, but the only justification was the conclusory assertion that releasing the information would lead to the informant's identification. Accordingly, a limited number of the withheld pages and passages must be reviewed *in camera* to determine if non-exempt material has been withheld.[15]

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14. Specifically, judgment is granted with respect to the following exemptions:

Doc. #	Page(s) (¶, line)
10	3 (¶ 1, lines 4, 5 & 6)
	12 (¶ 16, lines 1-3)
21	1 (¶ 1, lines 10, 11)
	5 (¶ 1, lines 1, 2, 6, 7, 8, 9 & 10)
	6 (¶ 17, line 1; ¶ 8, line 1; ¶ 9, line 1)
22	5 (¶ 10, lines 1, 4, 5, & 6)
53	1 (TO: line)
83	2 (¶ 3, lines 5, 8)

15. Specifically, *in camera* inspection is required for the following redactions:

Doc. #	Page(s) (¶, line)
129	1 (¶¶ 2-4)
	2
130	1 (¶ 4)

Further, since the status of some of the allegedly confidential sources remains in doubt until the government submits the additional information regarding the redaction, it is impossible at this time to evaluate defendants' failure to disclose information provided by those sources. Nonetheless, it is appropriate to note that for many of those redactions as well, it appears that non-exempt segregable material may have been withheld. Thus, even if the government is upheld in its assertions of implied confidentiality, some of the information withheld may have to be examined *in camera*.

As was acknowledged by Judge Weinfeld in *Lamont*, *supra*, the court recognizes its obligation to inspect the materials with due deference to defendants' judgment, "and will sustain its claims of exemption where the context of the material bears out the assertion that it is confidential information furnished only by the confidential source or might identify the source if revealed to plaintiff." 475 F.Supp. at 780.[16]

Exemption (k)(5)

Portions of five documents have been deleted pursuant to subsection (k)(5) of the Privacy Act, 5 U.S.C. § 552a. This provides, in pertinent part, that an agency may withhold

> investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment . . . but only to the extent that the disclosure of such material would re-

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131 1 (¶¶ 3, 4, 5)
132 1 (¶¶ 3-7)
2
280 1 (¶¶ 2-6)
283 1 (¶¶ 1, 2)
291 2 (¶¶ 1-3)

16. With regard to the 7(D) exemption, as was true for 7(C), plaintiff has challenged what he perceived as inconsistencies in the government's treatment of certain redactions. As was the case for the alleged inconsistencies in the use of the 7(C) exemption, plaintiff has failed to establish the presence of any troubling inconsistencies. Further, as was noted, *supra*, the mere presence of inconsistencies is not in itself probative of the government's good faith or reliability in employing the exemptions.

> veal the identity of a source who furnished information to the Government under the express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under the implied promise that the identity of the source would be held in confidence . . .

5 U.S.C. § 552a(k)(5) (1976). These exemptions raise issues and arguments similar to thoise seen with respect to the (7)(C) and (7)(D) exemptions of the FOIA.[17]

Smith affirms (52-54) that the persons interviewed logically assume that their identities and their cooperation would be kept confidential. Similarly, his affidavit explains, cooperation from law enforcement agencies and commercial institutions in processing the background information provided on employment applications would be impeded if the assumed confidences were not honored. The (k)(5) exemption has been invoked a limited number of occasions in these documents, and in each case only small passages, usually one line or less, have been deleted.

Plaintiff's challenge to the use of this exemption has been desultory. He argues only that the age of the material belies any danger attributed to its disclosure, and that defendant should be required to justify any assumption of confidentiality. Plaintiff has not argued effectively why the material's age should be thought to extinguish the need to protect the identity of the sources involved. Even if the privacy interests of the informers are diminished with the passage of time, *see supra*, their privacy interests are not the only, or even the dominant, basis for protecting their identities. As the Smith Affidavit has explained, ongoing confidentiality regarding an informant's identity is vital to the success of the government's investigations of employment applications, no matter how long ago their contribution. It would impede the government's investigatory capacity to reveal the names of those persons who supplied confidential information about an applicant for federal employment applicants.

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17. As the court noted in *Castle v. U. S. Civil Service Commission*, 77 Civ. 1544 (D.D.C. 1979), virtually no decisions have dealt directly with this issue, but cases pertaining to the 7(C) and 7(D) exemptions are pertinent.

Nor is plaintiff's argument persuasive, relying on *Nemetz v. Dept. of Treasury*, 446 F.Supp. 102 (N.D.Ill.1978), that defendants should be required to justify any assumption of implied assurances of confidentiality. In *Nemetz*, the court concluded that defendant's statement that it had been a policy of the Secret Service to assure sources of confidentiality was not sufficient to justify the excision of material in that case, especially in light of the government's apparently inconsistent treatment of source identities, releasing some but protecting others. The Smith Affidavit alleges more than the existence of a policy of assuring confidentiality, and asserts in each case that the interview presented a situation in which confidentiality is implied. There is no basis apparent for not accepting those allegations and more should not be expected of the Bureau with respect to sources more than thirty years old. *Cf. Lamont, supra* at 779.

The Scope of Plaintiff's Requests

The government refused to release a limited number of documents to plaintiff on the grounds that they were beyond the scope of his request. Plaintiff has challenged these refusals, arguing, for the most part, that the government's pattern of such refusals is inconsistent. However, as has been seen previously, charges of inconsistency are ineffectual without more. The thrust of the Act's grounds for withholding documents are permissive rather than mandatory, *Mead Data Central v. U. S. Dept. of Air Force, supra*. The government has effectively rebutted plaintiff's charges that defendants construed the requests too narrowly, and summary judgment is granted with respect to these documents.

Damages

Plaintiff has also sought damages in the action. However, the FOIA does not provide for damages for defendants' failure to produce documents. *See* 5 U.S.C. § 552(a)(4)(B); *King v. Califano*, 78 Civ. 1158 (D.D.C. 1979). Damages may be awarded under the Privacy Act, 5 U.S.C. § 552a(g)(4)(A), if the agency has acted in "a manner which was intentional or willful," § 552a(g)(4), but plaintiff has not attempted the requisite showing to meet that yardstick.

Fee Waiver and Attorney's Fees

Plaintiff has challenged the government's denial of his application for a waiver of duplication fees, charged for the documents released to him. He has also moved, pursuant to 5 U.S.C. § 552(a)(4)(E), for an award of attorney's fees of $7,500.00.

The Act provides that each agency shall set a schedule of reasonable fees for document searches and duplication. 5 U.S.C. § 552(a)(4)(A). That subsection also provides, in pertinent part, that:

> Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefitting the general public.

The Department of Justice regulations governing fee waivers are set out in 28 C.F.R. §§ 16.9(a) and 16.46(a), which leave the waiver or reduction of fees to the discretion of the responsible individual determining access, for grounds such as indigency or benefit to the public as opposed to the requester individually. Plaintiff first sought a waiver of fees in a letter dated March 7, 1979, and appealed, on May 4, 1979, the initial denial of the waiver. Plaintiff contended, and still contends that he is a private individual, bearing the entire cost of research on an important subject. But a letter dated October 18, 1979, Diamond was advised that the waiver denial had been upheld. Two reasons were cited in that October letter. First, it was asserted that the actual benefit to the public of releasing the information could only be assessed after release. Second, the letter argued that the Department of Justice received a large number of waiver requests from authors, citing the same grounds as had plaintiff, and that, if each were granted, the total cost in public funds would be vast, "with no real guarantee of any benefit to the general public." The fees at issue total $62.00. Both plaintiff and defendants have acknowledged that the appropriateness of the fee waiver will depend, in part, on the importance that may be ascribed to the release of the documents. This, in turn, will depend on the court's *in camera* review of a number of docu-

ments, for only then can the historical significance be assessed accurately. Accordingly, the review of the FBI's denial of Diamond's application for fee waiver will be stayed until *in camera* review is completed.

Similarly, plaintiff's motion for attorney's fees must be stayed until review of the redactions and withholdings is finished. Reasonable attorney's fees may be awarded only when plaintiff has "substantially prevailed" under the Act. § 552(a)(4)(E). If plaintiff has substantially prevailed, it is within the court's sound discretion to award him such fees. *Vermont Low Income Advocacy Council, Inc. v. Usery*, 546 F.2d 509, 513 (2d Cir. 1970); *Kaye v. Burns*, 411 F.Supp. 897, 903 (S.D.N.Y.1976) (Carter, J.). To establish that he has substantially prevailed under the Act, Diamond must show "at a minimum that the prosecution of the action could reasonably have been regarded as necessary and that the action had a substantial causative effect on the delivery of the information." *Vermont*, *supra* at 513. While it seems clear that plaintiff's action was necessary to secure from the government the indexes and affidavits that would permit litigation and resolution of the disputes concerning these documents, plaintiff has not shown, nor does it appear, that his action has, as yet, caused documents to be released. This question, as well as the historical significance of the information released, can only be evaluated after the court has reviewed the document *in camera* that it has ordered to be produced, to see if any non-exempt segregable material has been withheld.

IT IS SO ORDERED.

SIGMUND DIAMOND

-against-

FEDERAL BUREAU OF INVESTIGATION, WILLIAM WEBSTER, Director, Federal Bureau of Investigation, UNITED STATES DEPARTMENT OF JUSTICE, GRIFFIN BELL, Attorney General of the United States, UNITED STATES DEPARTMENT OF STATE, and CYRUS VANCE, Secretary of State

79 Civ. 3770 (RLC)

ENDORSEMENT

In compliance with the court's memorandum opinion and order of August 5, 1981, Special Agent Tom D. King of the Federal Bureau of Investigation has presented for *in camera* inspection documents listed in footnote 5, slip. op., which were withheld pursuant to exemption (b)(1), on the authority of Executive Order 12065, Section 1-301(C), with Item 52 being withheld under Section 1-301(b). Examination of the documents convinces the court that the documents were properly withheld either because release would lead to disclosure of intelligence source and, in the case of document 52, governmental secret intelligence information.

The government has presented for *in camera* inspection documents listed in footnote 8, slip. op. withheld pursuant to exemption b(7)(C). The court has examined all of these documents and finds them to have been properly withheld since their release would constitute an unwarranted invasion of personal privacy in that disclosure of the individuals who were subjects of information supplied to the government should only occur with the consent of the third parties themselves.

The government has also produced for *in camera* inspection documents listed in footnote 15 of the court's August 5 opinion and withheld under exemption (b)(7)(D). Examination of the documents satisfies the court that the exemption was properly invoked and that disclosure would identify confidential sources

or, at a minimum, jeopardize the continued confidentiality of the sources.

In further compliance with the order, the Special Agent has filed a supplemental affidavit in reference to redacted or withheld documents listed in footnote 13 of the court's opinion pursuant to exemption (b)(7)(D). The supplementary affidavit appropriately supplies the reasonable basis for the government's action absent from the original affidavit since King indicates that the interviewee either asked that his identity not be revealed, or knew he was speaking to F.B.I. agents under circumstances where it would be expected that his identity would not be revealed. Accordingly, the court is satisfied with the government's explanation and find reliance on the (b)(7)(D) exemption appropriate.

Finally, the government, as directed, has searched its file to determine whether there are any persons whose privacy is at issue, who are now dead or are still opposed to disclosure of their identities and the fact of their cooperation with the government. Of a total of 156 persons involved, the government search has disclosed that 22 are now dead and documents containing information about the identities of these persons has now been released to plaintiff. The court is advised that 37 persons are not the subject of F.B.I. investigation and the F.B.I. has no files on these individuals. Of the remaining 97, six had made public their communist affiliations which makes it pointless to withhold documents showing that these six were the subject of investigation concerning such affiliations and documents withheld pursuant to exemption (b)(7)(C) in the case of these six have been released to plaintiff. The remaining 91 individuals are or have been the subject of F.B.I. investigations involving communist affiliations, matters of internal security or loyalty, security of government employees, espionage, etc. It appears that all but three of the matters listed under investigation are closed. King states that there is nothing in the files to indicate that these individuals are agreeable to have the fact that they were the subject of investigation by the government disclosed. My own view would be that it is far more probable than not that they would not want the matter made public. I would think that in

light of the sensitive nature of the matters involved and the potential personal damage disclosure might cause that the government is warranted in refusing to reveal the identities of the 91 unless, as in the case of the six that publicly disclosed their communist affiliation, the third parties concerned take affirmative steps to make clear that they favor or are indifferent to disclosure of the fact of their being the subject of government investigation.

Plaintiff's counsel has requested the opportunity to examine the documents submitted *in camera* under restriction of confidentiality even from the plaintiff. The government is opposed to this procedure. The court did not avail itself of the offer because it seemed to the court that it was in the most neutral position of all concerned and hence better suited to determine the propriety of the action taken than either partisan to this litigation. No expertise or special knowledge was required, just ordinary common sense.

IT IS SO ORDERED.

Dated: New York, New York
January 26, 1982

ROBERT L. CARTER
U.S.D.J.